the Union and foreign countries is attributable, not to ignorance of the terms of the Constitution, but to a profound conviction of public policy. At one time there existed conceptions of state rights which inevitably resulted in an attempt to dissolve the Union; but even during that period, when the states were perhaps more jealous of their own rights than at any other time, we find no example of their entering the field of foreign affairs. One may venture the opinion, therefore, that if this clause of the Constitution were to be reformulated today, the phrase "or with a foreign power" would be omitted entirely. The real reason why we have not had compacts between the individual states and foreign countries in the past is that such an expedient has been deemed inherently subversive of our national unity, and inevitably productive of an impression of paramount state right and of national inadequacy in foreign affairs. In the conduct of foreign relations, national unity, both in appearance and in reality, is a prime requisite. The inevitable result of allowing the states to enter into conventional relations with foreign powers would be the ultimate destruction of our national unity, both real and apparent, and this proposal, therefore, irrespective of any merits which, upon a superficial investigation, it may appear to have, should be discarded as tending to subvert that great principle.

IMPUTED NEGLIGENCE

The recent evolution of the doctrine of "imputed negligence" has been a continuous struggle[1] by the courts to free themselves from a legal anomaly which has in its favor hardly more than a respectable group of seemingly important decisions.

Where an injured plaintiff guilty of contributory negligence sues a defendant whose negligence helped to cause the injury to the plaintiff, two conflicting lines of reasoning exist for permitting or denying a recovery. (1) It is urged that the plaintiff should not be allowed to recover because he should not benefit by his own wrong, and that the public interest requires the prevention of carelessness by leaving each negligent person to suffer the full extent of the harm resulting to him.

States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. . . . . But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country." *Geofroy v. Riggs, supra* note 13. It seems clear, therefore, that any matter concerning which concerted action between a number of the states and a foreign country is admitted to be desirable would be a proper subject of negotiation with a foreign power and hence within the treaty-making power of the federal government.

[1] Wisconsin, the first American state to adopt the doctrine of imputing the negligence of a driver to a passenger [*Predeaux v. Mineral Point* (1878) 43 Wis. 513], is one of the latest states to reject it. *Reiter v. Grober* (1921) 173 Wis. 493, 181 N. W. 739. See NOTES (1921) 19 MICH. L. REV. 858.

(2) The contrary argument is that the plaintiff should be allowed to recover, since he should not be the sole and only sufferer from the accident, being no more and probably less negligent than the defendant; and that the public interest requires the prevention of carelessness by penalizing the negligent defendant, who ought not to escape all responsibility for his negligence simply because another, who was also negligent, happens to be the plaintiff.

With the exception of cases in admiralty,[2] the courts have unanimously and correctly[3] denied a recovery to a negligent plaintiff,[4] because of the first reason. The defendant escapes the payment of damages not because he ought not to pay, but because the plaintiff ought not to receive.[5] There is, however, enough cogency in the second reason to prevent the application of the general rule as against those who have not personally been negligent although someone associated with them may have been.

The recent California case of *Dunbar v. San Francisco-Oakland Terminal Rys.* (1921, Calif.) 201 Pac. 330, held that the contributory negligence of a husband while driving a vehicle, would be imputed to his wife, who was riding with him. California has a community interest statute, however, which creates in the husband and wife a relationship in the nature of a partnership.[6] Almost all courts now refuse to impute the husband's negligence to his wife in such a case. Modern statutes have generally given a married woman the capacity to sue and to own property in her own name,[7] with the result that the husband can not be said to be benefiting by his wife's recovery. Neither should the husband's negligence be imputed to the wife on the theory that the husband was driving as the wife's agent, merely because of the marital relationship.[8] *Thorogood v. Bryan*,[9] the first case to impute the negli-

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[2] Hughes, *Admiralty* (2d ed. 1920) 312.

[3] But see Beasley, C. J., in *Consolidated Traction Co. v. Hone* (1896) 59 N. J. L. 275, 277, 35 Atl. 899, 900: ". . . . the legal doctrine that bars a party injured by the unintentional misconduct of another by reason of his having himself been, in a measure, the occasion of the resulting damage, is rather an artificial rule of law than a principle of justice, for its effect generally is to cast the entire loss ensuing from the joint fault upon one of the culpable parties, and oftentimes upon him who is but little to blame."

[4] The law of contributory negligence is always limited by the "last clear chance" rule, and if the defendant had the last chance to avoid the accident the plaintiff will be allowed to recover, even though he was also negligent. *Butterfield v. Forrester* (1809, K. B.) 11 East, 60. See COMMENTS (1920) 29 YALE LAW JOURNAL, 896. Thus the contributory negligence rule is in part nullified by the skilful use of language relating to proximate cause.

[5] (1916) 1 So. L. QUART. 154.

[6] Tiffany, *Domestic Relations* (3d ed. 1921) 150; see also Evans, *Community Obligations* (1922) 10 CALIF. L. REV. 120.

[7] 1 Schouler, *Domestic Relations* (1921) 382; 1 Mechem, *Agency* (1914) 121.

[8] 1 Mechem, *loc. cit.*

[9] (1849, C. P.) 8 C. B. 114.

gence of a driver to a passenger, even though he had no control, has been repudiated in England[10] and in every jurisdiction in this country except Michigan.[11]

The non-imputability rule, in the case of an infant child, injured by the negligence of its parent concurring with that of the defendant, has not received such unanimous support.[12] The New York case of *Hartfield v. Roper*[13] originated the rule, in this country, of imputing the negligence of the father to the child. There the child, who brought the action, was denied a recovery because of the negligence of its father, on the theory that the father was the agent for the child's care. This theory, if carried to a logical conclusion, shows its own fallacy in that as principal the child would be held liable for the tort or breach of contract of its father. An *ex post facto* reason now given for the rule of *Hartfield v. Roper* is that while the damages recovered belong technically to the child's separate estate they will, as a practical matter, go to the parent, and thus there will accrue a substantial benefit to a party whose negligence helped cause the damage.[14] But the law does not recognize the right of the parent to money recovered by the infant.[15] If, however, the parent may so manipulate the money received as to secure personal benefit from it, such a result should be prevented by action against him rather than avoided by denying compensation to the child.

When the father or husband sues for the loss of services of a child or wife guilty of contributory negligence and he, the father or husband, is not at fault, the cases, few in number, impute the negligence of the child or wife to the plaintiff.[16] It is submitted that these cases are not sound. The right of the father or husband to damages for the loss of

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[10] *The Bernina* (1887, C. A.) L. R. 12 Prob. Div. 58.

[11] NOTES (1921) 19 MICH. L. REV. 858; but see *Jewell v. Rogers Tp.* (1919) 208 Mich. 318, 175 N. W. 151.

[12] The following states still impute the father's negligence to the child: Delaware, *Kyne v. Wilmington & N. Ry.* (1888) 8 Del. 185, 14 Atl. 922; Indiana, *Evansville, etc. Ry. v. Wolf* (1877) 59 Ind. 89; Kansas, *Atchison, etc. Ry. v. Smith* (1882) 28 Kan. 541; Maine, *Morgan v. Aroostook Valley Ry.* (1916) 115 Me. 171, 98 Atl. 628; Maryland, *Baltimore, etc. Ry. v. McDonnell* (1875) 43 Md. 534; Massachusetts, *Sullivan v. Chadwick* (1920) 236 Mass. 130, 127 N. E. 632; Minnesota, *Fitzgerald v. St. Paul Ry.* (1882) 29 Minn. 336, 13 N. W. 168; New York, *Hartfield v. Roper* (1839, N. Y.) 21 Wend. 615; *McGarry v. Loomis* (1875) 63 N. Y. 104; *Manion v. Richmond Ice Co.* (1909) 133 App. Div. 254, 117 N. Y. Supp. 353.

[13] *Supra* note 12.

[14] See Gilmore, *Imputed Negligence* (1921) 1 WIS. L. REV. 193, 201.

[15] Tiffany, *op. cit.* sec. 140; 1 Schouler, *op. cit.* sec. 738; (1917) 65 U. PA. L. REV. 382, 385. When the parent receives such funds he is regarded as holding them in trust for the infant. *Bedford v. Bedford* (1891) 136 Ill. 354, 26 N. E. 662.

[16] *Winner v. Oakland Tp.* (1893) 158 Pa. 405, 27 Atl. 1111; *Chicago, B. & Q. Ry. v. Honey* (1894, C. C. A. 8th) 63 Fed. 39; *Wueppesahl v. The Conn. Co.*

services of his child or wife is entirely distinct and separate from the right of the child or wife to recover for injuries.[17] Had the defendant alone been negligent he would have to pay damages to the child or wife for loss of services or *consortium*. Because of the rule of contributory negligence the defendant is not liable in an action by the child or wife, not because he ought not to pay, but because they ought not to receive. When, however, the non-negligent parent or husband brings his action for loss of services, the courts are called upon to decide which of two parties, one innocent and the other negligent, should be preferred. There seems no logic or justice in invoking the fiction of imputed negligence in such a case, and the plaintiff ought to recover.

If the child or wife dies because of injuries due in part to their contributory negligence, and the father or husband brings an action for wrongful death under a statute modeled on Lord Campbell's Act, he can not recover.[18] This, however, is because of an express limitation in the statute allowing an action to the beneficiary only if the deceased could have recovered had he lived, and not because of any imputation of negligence.

Where the negligence of the father or husband contributes to the death of the child or wife, and he brings an action under a death statute, the cases are in conflict.[19] Such an action, however, depends entirely upon the interpretation of the statute in the particular jurisdiction and there is no question of imputed negligence.[20] In cases of bailor and bailee, the negligence of the bailee is generally not imputed to the bailor.[21] The negligence of an employee is not imputed to a co-employee.[22] The negligence of one member of a joint enterprise will be imputed to the other on the ground of agency. Whether a partic-

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(1913) 87 Conn. 710, 89 Atl. 166; *Burke v. Broadway, etc. Ry.* (1867, N. Y. Sup. Ct.) 49 Barb. 529; *contra, Texas & Pac. Ry. v. Brick* (1892) 83 Tex. 526, 20 S. W. 511.

[17] 1 Schouler, *op. cit.* secs. 677, 757.

[18] (1921) 31 YALE LAW JOURNAL, 103; see Gilmore, *op. cit.* 1 WIS. L. REV. 198.

[19] (1921) 31 YALE LAW JOURNAL, 103; see collection of cases, 18 L. R. A. (N. S.) 328, note.

[20] For a discussion of this point and also imputation of negligence if there are several beneficiaries, see (1914) 1 VA. L. REV. 318.

[21] *Fischer v. International Ry.* (1920, Sup. Ct.) 112 Misc. 212, 182 N. Y. Supp. 313 (negligence of borrower of an automobile not imputed to the owner); *Bower v. Union Pac. Ry.* (1920) 106 Kan. 404, 188 Pac. 420 (negligence of carrier not imputed to shipper); *Lloyd v. Northern Pac. Ry.* (1919) 107 Wash. 57, 181 Pac. 29; *N. Y., etc. Ry. v. N. J. Electric Co.* (1897) 60 N. J. L. 338, 38 Atl. 828; *Currie v. Consolidated Ry.* (1908) 81 Conn. 383, 71 Atl. 356; *Sea Ins. Co. of Liverpool v. Vicksburg* (1908, C. C. A. 5th) 159 Fed. 676; *contra, Welty v. Indianapolis Ry.* (1886) 105 Ind. 55, 4 N. E. 410; *Moore v. Stetson* (1902) 96 Me. 197, 52 Atl. 767; *Ill. Cent. Ry. v. Sims* (1900) 77 Miss. 325, 27 So. 527.

[22] *Ratcliff v. Mexico Power Co.* (1918, Mo. App.) 203 S. W. 232; *Stoker v. Tri-City Ry.* (1917) 182 Iowa, 1090, 165 N. W. 30; *Siever v. Pittsburg, C. C. & St. L. Ry.* (1916) 252 Pa. 1, 97 Atl. 116.

ular enterprise is joint, so as to make one party the agent of the other, is a question of fact to be decided in each particular case.[23]

It may be advisable then, to lay down the rule that contributory negligence should never be imputed; that is, if A sues B to recover damages suffered by A because of B's negligence, the contributory negligence of C should not be imputed to A. In the case of principal and agent, recognizing imputed negligence as a fiction, the negligence of the agent may nevertheless prevent recovery by the principal for the general reasons underlying the maxim *respondeat superior*. This exception should be recognized only in cases of express and unequivocal agencies, and the agency relationship should never be implied in order to apply the fiction of imputed negligence. The instant case, because of a community-interest statute creating a partnership between a husband and wife in relation to their property, falls within this one exception to the rule that the contributory negligence of another should never be imputed to the plaintiff.[24] The doctrine of imputed negligence is fast losing ground and should soon be of only academic and historical interest. It is to be hoped that the jurisdictions still clinging to it will soon fall in line with the majority, and will impute negligence only in cases where an express and unequivocal agency exists.

BUSINESS CO-OPERATION, THE "OPEN COMPETITION PLAN," AND THE SHERMAN ANTI-TRUST ACT

A new form of business association known as the "open competition plan" or "open price association" has again raised the question of what is restraint of trade within the meaning of the Sherman Act.[1] The asserted object of such associations is to eliminate "cut throat" competition and to enable their members to conduct their business more scientifically, with a sounder knowledge of trade conditions. The members contribute to a central bureau complete information about their business, such as the amount of sales, stock on hand, price lists, etc. These reports are then consolidated by an expert appointed by the association and sent out to the members. The frequency of reports and the details required vary in different associations, but the purpose is similar.[2] It may be easily seen that such an organization has a potential power to limit supply and fix prices, if sufficient co-operation or coercion exists among the members. The Supreme Court of the

[23] As to what constitutes a joint enterprise see (1918) 27 YALE LAW JOURNAL, 565; (1920) 5 IOWA L. BUL. 121.

[24] Each partner is a general agent for the other. Gilmore, *Partnership* (1911) 274.

[1] Act of July 2, 1890 (26 Stat. at L. 209).

[2] For a discussion of the formation, organization, and actual operation of such associations, see Naylor, *Trade Associations* (1921). For a radical viewpoint supporting such associations see Eddy, *The New Competition* (1912).